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No. 89-1210

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANET HARDUVEL, *et al.*,
Petitioner,

v.

GENERAL DYNAMICS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner has demonstrated any basis under Rule 17.1 of the rules of this Court upon which this Court should issue a writ of certiorari?

2. Whether the Eleventh Circuit correctly applied the government contractor defense, as formulated by this Court in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), in reversing the award of damages at trial?

3. Whether the Eleventh Circuit acted within its authority in reversing the district court's denial of judgment notwithstanding the verdict?

Rule 28.1 List

For Respondent General Dynamics Corporation:

Parent: None

Subsidiaries and Affiliates:

American Overseas Marine Corporation
Cessna Aircraft Company
Freeman United Coal Mining Company
General Dynamics Service Company
Marblehead Lime Company
Material Service Corporation

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent General Dynamics Corporation respectfully requests that this Court deny the petition for a writ of certiorari filed by Janet Harduvel on January 29, 1990. As will be demonstrated below, this petition fails to comply with the standards for issuance of a writ of certiorari established by Rule 17.1 of the Rules of this Court.

STATEMENT OF THE CASE

This action arises out of the fatal crash in Korea of an F-16 fighter plane piloted by United States Air Force Captain Theodore Harduvel. His widow, Janet Harduvel,

brought the action on behalf of his estate, individually, and on behalf of his minor child, against the manufacturer of the aircraft, General Dynamics Corporation (hereinafter "General Dynamics").

The Accident: On November 15, 1982, Captain Harduvel was the leader of a flight of three F-16 aircraft on a routine training mission. Approximately eight minutes into the flight, Captain Harduvel radioed the other two members of the flight: "Knock it off. One's got a problem. Two join on me. Three continue the route." This final communication from Captain Harduvel informed the other pilots that he was experiencing an unspecified difficulty, ordered the pilot of the number two aircraft to maneuver closer to him, and commanded the pilot of the number three aircraft to continue the mission.

After sending this message, Captain Harduvel started his plane into a left-hand turn. Before the pilot of the number two aircraft could join up with Harduvel's plane, Harduvel left available clear air and flew into a small cloud. After emerging from this first cloud, Harduvel flew in clear air for a few seconds, then entered a solid cloud bank.

At this point, both of Captain Harduvel's fellow pilots lost sight of him altogether. Both testified that, at the time they last saw Harduvel's aircraft, it appeared to be flying normally and showed no sign of any fire. Shortly after turning into the cloud, however, Captain Harduvel flew his airplane into the back of a mountain ridge at a downward angle of approximately sixty degrees, with wings level. Captain Harduvel was killed on impact and the F-16 was almost completely destroyed.

Although there were no witnesses to the final seconds of the flight, both parties have agreed that Harduvel somehow became disoriented while in the clouds and allowed the aircraft to go into a steep dive. What was in question at trial was the cause of his disorientation. Peti-

tioner's theory, in summary, was that an electrical failure deprived Harduvel of the use of certain flight instruments, including the attitude direction indicator ("ADI"), leading to his disorientation.

Although the aircraft had virtually disintegrated on impact, several components were recovered. In particular, the ADI was recovered with a captured reading showing the correct 65 degree nose-down attitude. Several electrical components were also recovered in a state showing that they were receiving electrical power at impact. Both sides relied heavily on expert testimony to interpret the physical evidence and to show what had probably occurred in the final moments before the crash.

The Trial: Petitioner filed an action in the United States District Court for the Middle District of Florida on the basis of diversity jurisdiction. Petitioner's theory of the accident was that the electrical wiring in the right-hand strake [1] of the aircraft began to chafe so severely during flight that it caused a fire that spread from one electrical panel to another, eventually cutting off all electrical power to the plane's flight navigational instruments. Petitioner conceded that Captain Harduvel had lost visual orientation of the ground while in the cloud bank, and contended that this alleged failure of the flight instruments prevented him from determining whether his aircraft was in a normal or inverted posture, and, indeed, whether it was climbing or diving.[2] Based on these premises, Petitioner asserted theories of negligence, strict liability in tort due to design defect and manufacturing defect, and failure to warn.

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[1] A "strake" is a forward compartment in the fuselage located beneath and to the side of the cockpit.

[2] Petitioner omits from her Statement of the Case that Harduvel's aircraft was equipped with a standby attitude indicator, an instrument that provides the pilot with accurate gyroscopic navigational information for a minimum of nine minutes following cessation of all power, including a total electrical failure.

General Dynamics denied all of these claims, contending that there was no evidence to support any of them. General Dynamics also asserted that Captain Harduvel's negligence was the primary cause of, or at least contributed to the cause of, the accident.

Most importantly for purposes of this Brief in Opposition, however, General Dynamics asserted the government contractor defense and presented evidence to establish that, in designing the F-16, General Dynamics was following reasonably precise directions and specifications approved by the Air Force, that Harduvel's aircraft conformed to such specifications, and that the Air Force possessed equal or greater knowledge than General Dynamics concerning hazards associated with the use of such aircraft. Nevertheless, the trial judge rejected General Dynamics' motion for summary judgment based on the defense. Moreover, although the jury hearing the case was instructed on the government contractor defense, it was given the formulation of the defense used by the Eleventh Circuit in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 746 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988), which was a narrower formulation of the defense that was subsequently rejected by this Court's decision in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988).

The jury found for Petitioner on all counts and awarded a total of $3.1 million in damages: $1.6 million to Captain Harduvel's estate and $750,000 each to his widow and child. General Dynamics, having previously moved for a directed verdict at the conclusion of Petitioner's evidence and, again, at the conclusion of all the evidence, then moved on all counts for judgment notwithstanding the verdict (hereinafter "judgment *n.o.v.*") pursuant to Fed. R. Civ. P. 50(b), and, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 59.

The trial judge denied General Dynamics' motions for judgment *n.o.v.* and a new trial in a memorandum deci-

sion. In this decision, however, the judge set aside the jury's verdict on the two failure to warn claims, holding that there had not been sufficient proof to take these issues to the jury. Nontheless, the judge allowed the design and manufacturing defect claims, as well as the full amount of the jury verdict, to stand. In addition, the judge upheld the jury's finding that General Dynamics had not proved the government contractor defense as formulated in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988).

The Appeal: General Dynamics filed with the United States Court of Appeals for the Eleventh Circuit an appeal challenging both the underlying judgment and the trial court's denial of its motions for judgment *n.o.v.* and new trial.[3] In a unanimous opinion authored by the Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court (retired), who was sitting by designation, a panel of the Eleventh Circuit reversed the judgment of the district court and remanded the case to the trial court for entry of judgment in favor of General Dynamics. *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989).

The Eleventh Circuit reversed the award of damages because it was inconsistent with this Court's formulation of the government contractor defense in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), which was decided approximately nine months after the trial court's denial of General Dynamics' motions for judgment *n.o.v.* and new trial in the instant action. This Court established in *Boyle* that the United States Government's procurement of military hardware was a "uniquely federal interest" which required that the military contractor be shielded from tort liability for product design. Recognizing that application of ordinary state tort law to military

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[3] Petitioner also appealed as to the trial court's denial of her motion for pre-judgment interest and the order setting aside the jury verdict on failure to warn.

design and procurement decisions was inappropriate, this Court fashioned a federal common law defense that would protect military contractors. This Court used as its rationale the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), which similarly protects employees and agents of the Government. *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2514-18 (1988); *see Harduvel v. General Dynamics Corp.*, 878 F.2d at 1315-16.

The *Boyle* test establishes that

> [l]iability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Boyle, 108 S.Ct. at 2518. The Eleventh Circuit found that these three conditions "serve to ensure that the defense operates to immunize the contractor *only where* the government has actually participated in discretionary design decisions, either by designing a product itself or approving specifications prepared by the contractor." *Harduvel*, 878 F.2d at 1316 (emphasis added).

The Eleventh Circuit held that, although Petitioner described her theory of wire chafing and electrical failure as a manufacturing defect, it was, instead, a design defect theory for the purposes of the government contractor defense under *Boyle*. The court rejected Petitioner's contention that a finding of defective manufacture by a jury applying state law was sufficient to remove the government contractor defense from the case. Instead, the court ruled that the government contractor defense displaced the state law inference of the existence

of a product defect which is available in certain limited circumstances where the product at issue is destroyed in the accident. *Harduvel*, 878 F.2d at 1317.

Moreover, the Eleventh Circuit held that, in determining whether a claimed defect is one of design or of manufacture for the purposes of the defense, a court must ensure the protection of discretionary government functions for which the defense is intended. To this end, the court ruled that the defense would apply only if the defect at issue is inherent in the product or system that the government has approved. The defense would not apply if the defect is merely an instance of shoddy workmanship—*i.e.*, if it does not conform to specifications, the second prong of the *Boyle* test. *Id.* at 1317.

After a thorough analysis of the specific evidence on which the trial court relied to justify its denial of judgment *n.o.v.* on the manufacturing defect claims, the court held that this evidence did not suffice to support the jury's verdict. *Id.* at 1317-20. Applying the three prongs of the *Boyle* test to the evidence in the record, the Eleventh Circuit concluded that, as a matter of law, General Dynamics had established its entitlement to the protection of the defense. *Id.* at 1320-22. Accordingly, on July 31, 1989, the Eleventh Circuit reversed the verdict in the trial court and ordered the entry of judgment in favor of General Dynamics.

Shortly thereafter, Petitioner requested from the Eleventh Circuit a panel rehearing or, in the alternative, a rehearing *en banc*. On October 31, 1989, the court denied both. On January 29, 1990, Petitioner filed the petition for writ of certiorari now before this Court.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUITS AS TO THE GOVERNMENT CONTRACTOR DEFENSE.

Petitioner cites, as the basis for this Court's review of the Eleventh Circuit's decision, Rule 17.1 of the Supreme Court Rules, which states, in pertinent part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

On the basis of subsection (a) of this rule, Petitioner's first three arguments for issuance of a writ of certiorari allege that there are conflicts among the circuits as to the interpretation of certain issues regarding the government contractor defense. Upon closer inspection, however, it becomes evident that Petitioner is seeking to manufacture conflicts among the circuits where none exist.

At the heart of each of Petitioner's argument is her understandable dismay that the Eleventh Circuit has characterized the evidence presented at trial as directed at proof of a design—rather than a manufacturing—defect, thereby bringing her claims within the ambit of

the government contractor defense. Consequently, most of the petition is spent rehashing the trial record to bring to this Court's attention evidence which is extraneous to the question of whether the Eleventh Circuit's opinion below is consistent both with the decision in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), and with the decisions of the other circuits since *Boyle* regarding the government contractor defense.

A. There Is No Conflict Among The Circuits As To The Preeminence Of The *Boyle* Formulation Of The Government Contractor Defense Over State Tort Law Rules When Military Design And Procurement Decisions Are Involved.

The government contractor defense represents an attempt to answer the question of whether, given the United States' immunity to tort claims such as the one here, "a supplier of military equipment should be required to shoulder directly and immediately the entire burden of the liability to the injured serviceman." *McKay v. Rockwell International Corp.*, 704 F.2d 444, 448 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). The formulation of the defense adopted in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), is intended to shield manufacturers of products made for the military from tort liability for alleged deficiencies in product design. *Id.* at 2518. The defense is derived from the principle that where a contractor acts under the authority and direction of the United States, it shares the sovereign immunity that is enjoyed by the Government. *Id.* at 2514-15 (citing *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940)). Perhaps the best explanation of the policy considerations underlying the *Boyle* formulation of the defense is found in the opinion below:

> The Supreme Court's adoption of the government contractor defense recognizes that one of [the risks assumed by the pilots and crews of military air-

> craft] is the operation of equipment in which safety concerns have been balanced against cost and performance. With respect to consumer goods, state tort law may hold manufacturers liable where such a balance is found unreasonable. In the sensitive area of federal military procurement, however, the balance is not one for state tort law to strike. Although the defense may sometimes seem harsh in its operation, it is a necessary consequence of the incompatibility of modern products liability law and the exigencies of national defense.

Harduvel, 878 F.2d at 1322.

With the decision in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), this Court both recognized the government contractor defense and resolved two serious conflicts among the circuits as to the proper formulation of the defense. The first conflict pertained to the substantive elements of the defense (and will be addressed in detail in the next section of this Brief); the second, to the relative weight to be accorded the defense when it conflicted with state tort law, particularly product liability law. Since the decision in *Boyle*, the federal courts uniformly have recognized that the government contractor defense applies to both negligence and strict liability actions, as well as other state law claims, as a matter of federal common law. *See, e.g., Smith v. Xerox Corp.*, 866 F.2d 135, 136 (5th Cir. 1989); *Zinck v. ITT Corp.*, 690 F. Supp. 1331, 1333 (S.D.N.Y. 1988); *Nicholson v. United Technologies Corp.*, 697 F. Supp. 598, 604 n.2 (D. Conn. 1988).[4]

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[4] The sole source of disparate, if not conflicting, decisions under the Government contractor cases since *Boyle* has been the issue of whether the defense applies to failure to warn claims. *See, e.g., Garner v. Santoro*, 865 F.2d 629 (5th Cir. 1989); *Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. 1019, 1025 (S.D. Ill. 1989); *Nicholson v. United Technologies Corp.*, 697 F. Supp. 598 (D. Conn. 1988). This issue is not raised in this case, because the trial court dismissed Petitioner's failure to warn claims for lack of evidence, and the Eleventh Circuit agreed. *Harduvel*, 878 F.2d at 1321.

In *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), this Court addressed the issue of "when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect." *Id.* at 2513. This Court recognized two necessary conditions for the displacement of state tort law. The initial predicate for preemption is that the case must concern an area of uniquely federal interest, such as procurement of equipment by the United States. If this is found to be the case, state tort law wil be displaced by the government contractor defense if a "significant conflict" exists between federal policy or interest and the operation of state tort law, or if the operation of state tort law would frustrate specific objectives of federal legislation. *Id.* at 2515. This Court found that the facts in *Boyle* implicated an area of uniquely federal interest in which a significant conflict existed between federal policy and state law, and held that the government contractor defense displaced state tort law.

In the opinion below, the Eleventh Circuit performed the analysis outlined in *Boyle* and concluded that, based on the facts of the instant case, state law was displaced by the government contractor defense. Nonetheless, Petitioner asserts that the Eleventh Circuit's holding that the government contractor defense displaced state tort law is somehow an "unprecedented and unjustified expansion" of the defense. On the contrary, the decision below is completely consistent with *Boyle* and is in no way an expansion of the government contractor defense.

Consistent with this Court's decision in *Boyle*, General Dynamics met its burden of establishing conformance with government specifications. Petitioner never established the existence of a manufacturing defect—*i.e.*, a failure to conform to specifications. Indeed, to the extent that Petitioner introduced any evidence of defect, this evidence buttressed General Dynamics' evidence that the

product conformed. Moreover, Petitioner's arguments as to Florida law inferences are not persuasive of the existence of a defect other than a design defect.

Petitioner argues that the decision below conflicts with several government contractor defense cases, including the Fourth Circuit's decision in *Boyle* which this Court vacated and four other decisions rendered prior to the establishment of the government contractor defense as a matter of federal common law in *Boyle*.[5] Decisions

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[5] In addition, Petitioner cites *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989), and *McGonigal v. Gearhart Industries, Inc.*, 851 F.2d 774 (5th Cir. 1988), as the sole post-*Boyle* decisions that support the proposition that the federal courts rely on state tort law for standards of proof in government contractor cases. A reading of these cases, however, demonstrates that they are totally inapposite.

In *Ramey*, a civilian aircraft mechanic claimed that the aircraft ejection seat on which he was working accidentally fired, injuring him. He sued the company that had designed the ejection seat and the supervisory employee of McDonnell Douglas, the plane's manufacturer, who had instructed him to work on the seat. The case does not address standards of proof under state tort law, but whether the workers' compensation statute of Maryland extends the (conceded) immunity of McDonnell Douglas to the supervisor. The trial court held McDonnell Douglas immune because it was the plaintiff's statutory employer under the workers' compensation act. The trial court granted McDonnell Douglas' summary judgment motion on that basis, from which the plaintiff did not appeal. *Ramey*, 874 F.2d at 948. The trial court also held that the immunity under the workers' compensation act extended to the supervisor. *Id.* at 951.

The Fourth Circuit upheld the finding of the trial court that the immunity was extended. *Id.* Such holding in no way involved the government contractor defense.

In *McGonigal*, two soldiers were severely injured by the premature explosion of a grenade. The court upheld the jury's application of the doctrine of *res ipsa loquitur*, which is recognized under Texas law. This adoption of state law, however, did not conflict with the government contractor defense because the plaintiffs did not raise claims of design defect. Instead, they proceeded at trial solely on a theory of negligent manufacture. Indeed, the manufac-

rendered prior to *Boyle* that interpret the relationship of the government contractor defense to state tort law standards of proof in a manner different from *Boyle*, however, are totally irrelevant to this petition for a writ of certiorari. The decision of this Court in *Boyle* resolved a longstanding conflict among the circuits and between the state and federal courts as to whether to apply state or federal law and established a clear precedent on this issue. The Eleventh Circuit has followed that precedent to the letter, and no decision by a federal court since *Boyle* is remotely in conflict with the decision below.

Petitioner's unfounded allegation of a "conflict" among the circuits is a mere pretext to allow her to argue anew that the government contractor defense should not have applied in this case. This is illustrated by the fact that far more of her argument in the Petition is devoted to her assertion that the evidence which she presented at trial was intended to show that the aircraft in fact suffered from a failure to conform with Governmentally-approved specifications, than is devoted to a demonstration of any conflict among the circuits as to the displacement of state tort law by the defense. A plaintiff cannot avoid application of the government contractor defense, however, merely by choosing a favorable label or terminology for his or her argument. *Galik v. Lockheed Shipbuilding Co.*, 1989 U.S. Dist. LEXIS 15066 (S.D. Ala. Dec. 12, 1989).

In her effort to make the defense's displacement of state tort law appear unduly burdensome, Petitioner has distorted the manner in which Florida law operates. Petitioner asserts that the Eleventh Circuit incorrectly allowed the government contractor defense to displace a Florida law presumption of manufacturing defect when

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turer stipulated that the grenade was defective and that the defect arose in the manufacturing process. *McGonigal*, 851 F.2d at 776. The government contractor defense was not available in cases of defective manufacture. *Id.* at 777.

the product is destroyed. There is, however, no such presumption under Florida law. Instead, Florida tort law allows that absolute proof of product malfunction is not necessary where the product is destroyed, provided plaintiff can point to evidence that the cause of the accident most probably originated in the product. "It is left to the jury to hear the facts and infer a defect in a product if the evidence warrants an inference." *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 683 (11th Cir. 1984). It is clear that the rule states an inference that may be drawn by the jury, not a presumption to be applied.

More importantly, Petitioner incorrectly asserts that the inference points automatically to a manufacturing, rather than a design, defect. The decision in *Worsham*, however, makes no such distinction, nor does the trial court in its memorandum decision rejecting General Dynamics' motion for judgment *n.o.v.* and, in the alternative, for a new trial. The decision in *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla. Dist. 1981), upon which the Petitioner also seeks to draw support, suggests only that this inference is more appropriate to claims of defective manufacture, not that a jury's finding of defect where the product has been destroyed gives rise to a presumption that the defect was one of manufacture. In her effort to categorize the cause of the accident as a manufacturing defect, Petitioner has mischaracterized both the effect of this inference and the reasoning behind it. For these reasons, Petitioner's argument based on Florida law "presumptions" should be rejected out of hand.[6]

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[6] In addition, the trial court explicitly rejected Petitioner's reliance on the Florida tort rule that an inference of defect arises when a product malfunctions during normal use, thereby establishing a *prima facie* case for jury consideration. *See* Memorandum Decision, *Harduvel v. General Dynamics Corp.*, No. 84-1450-Civ.-T-10 (M.D. Fla. Sept. 30, 1987), *rev'd*, 878 F.2d 1311 (11th Cir. 1989). The court found this inference inapplicable as a matter of Florida law because Petitioner presented no direct evidence of malfunction in the plane's electrical system.

B. Contrary To Petitioner's Assertion, The Eleventh Circuit Did Not Place The Burden Of Proof As To The Second Prong Of The Government Contractor Defense On The Petitioner.

Petitioner again seeks to fabricate a conflict among the circuits by asserting that the Eleventh Circuit placed upon her the burden of disproving the second prong of the government contractor defense. Under the formulation of the defense sanctioned by this Court in *Boyle v. United Technlogies Corp.*, 198 S. Ct. 2510 (1988), liability for design defects in military equipment cannot be imposed, pursuant to state law, when: (1) the United States approved reasonably precise specifications; (2) *the equipment conformed to those specifications*; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *Id.* at 2518 (emphasis added). Petitioner contends that the Eleventh Circuit, in contrast to the other Courts of Appeal that have employed the *Boyle* formulation of the defense, required her to prove that the aircraft at issue did not comply with the Government's specifications.

Petitioner's assertion, however, misrepresents the appellate court's analysis of the government contractor defense in the opinion below, as well as the manner in which it was applied. Rather than hold that Petitioner failed to prove that the aircraft did not comply with the Air Force's specifications, the Eleventh Circuit held that Petitioner failed to refute General Dynamics' affirmative evidence that the aircraft did, indeed, comply with specifications. Included in such evidence was undisputed testimony that the screws that Petitioner alleged were protruding because of improper installation, thereby allegedly causing wire chafing, were simply "standard Air Force equipment that [General Dynamics] was required to use." *Harduvel*, 878 F.2d at 1320.

The Court of Appeals specifically noted that Petitioner had not independently addressed the second prong

of the *Boyle* test in her briefs. Instead, the Court held, Petitioner had presented evidence that the alleged defect pertained to the design, rather than the manufacture, of the aircraft's wiring system. *Harduvel*, 878 F.2d at 1317. Petitioner's evidence showed no more than that Harduvel's aircraft was a "typical F-16," *id.* at 1318, and that an allegedly defective electrical panel in the aircraft was "installed as intended by the existing design and accepted by the Air Force," *id.* at 1319, and that "protruding screws were a normal condition in the F-16, not a product of improper installation." *Id.*

Thus, it is evident that the Eleventh Circuit's holding that the aircraft complied with Governmentally-approved specifications arose from Petitioner's failure to present any evidence to controvert the evidence presented by General Dynamics that the aircraft conformed to approved specifications, rather than from an improper placement of the burden of proof. *See Smith v. Xerox Corp.*, 866 F.2d 135, 138-39 (5th Cir. 1989) (given undisputed testimony that Government had inspected weapons simulators as they were manufactured and the fact that plaintiff "was simply unable to adduce any evidence to show that [the weapon simulator at issue] was not made in accordance with its specifications," second prong of *Boyle* test was met). This inability to produce proof by Petitioner clearly does not warrant the issuance of a writ of certiorari.

C. The Eleventh Circuit's Entry Of Judgment *N.O.V.* Is Consistent With The Sole Decision From Another Circuit As To Which Petitioner Alleges There Is A Conflict.

Petitioner asserts a specious conflict among the circuits on the issue of whether remand to the trial court is required where the Court of Appeals applies the *Boyle* formulation of the government contractor defense rather than an earlier version of the government contractor defense employed at trial. In seeking to manufacture a conflict between the circuits on the issue of remand,

Petitioner suggests that the Fifth Circuit's decision in *Garner v. Santoro*, 865 F.2d 629 (5th Cir. 1989), states the proposition that remand is required where there has been no factual determination under *Boyle* in the trial court. The basis for remand in *Garner*, however, was the failure of the trial court to hear evidence regarding *any* form of the government contractor defense, not the failure to apply the *Boyle* standards.

In *Garner*, the district court had decided that the government contractor defense was inapplicable as a matter of law. 865 F.2d at 633. Indeed, no evidence as to the contractor's compliance with the elements of the defense was heard by the court. *See id.* at 636 (no offer of proof on the government contractor defense made by the contractor). For this reason, remand to the trial court was essential in *Garner* to determine whether there was a factual basis for the contractor's assertion of the defense.

In contrast, General Dynamics filed a motion for summary judgment based, in the alternative, on the same elements of the government contractor defense that were later adopted by this Court in *Boyle*, and presented evidence on each element at trial, and even requested jury issues on such elements at trial. *Harduvel*, 878 F.2d at 1316. The Eleventh Circuit could and did make extensive reference to evidence in the trial record to determine as a matter of law that General Dynamics met the requirements of the government contractor defense in the instant case. Contrary to Petitioner's assertions, therefore, she has had "an adequate opportunity to meet or rebut" the evidence adduced by General Dynamics.

II. THE ELEVENTH CIRCUIT CORRECTLY APPLIED APPELLATE STANDARDS IN ITS CONSIDERATION OF GENERAL DYNAMICS' JUDGMENT NOTWITHSTANDING THE VERDICT.

Invoking Rule 17.1(c) of the rules of this Court, Petitioner argues that a writ of certiorari should be issued because the Eleventh Circuit applied an incorrect standard of review in ordering the entry of judgment *n.o.v.* in favor of General Dynamics. Rule 17.1(c) states that a writ of certiorari may be issued:

> When a state court or a federal court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The Eleventh Circuit's decision below, however, did not address a new question of federal law, but merely followed a recent decision of this Court on an important federal issue. Moreover, as demonstrated above, the Eleventh Circuit's decision below is completely consistent with both the decisions of this Court and the courts of the other circuits as to the issues involved. Consequently, Petitioner's stated reason for seeking a writ of certiorari does not fall within the scope of Rule 17.1(c).

In any event, the Eleventh Circuit's entry of judgment *n.o.v.* was well within its authority and consistent with this Court's decision in *Boyle*. In *Boyle*, a case that followed a procedural course closely analogous to that of the instant case, this Court explicitly ruled that remand is not required by the Seventh Amendment's guarantee of jury trial. Instead, this Court stated:

> If the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict [for petitioner] under the properly formulated defense, judgment could properly be entered for the respondent at once, without a new trial. And that is so even though (as petitioner claims) respondent failed to object to jury instructions that expressed

> the defense differently, and in a fashion that would support a verdict.

Id. at 2519 (citations omitted). After a thorough review of the trial record, the Eleventh Circuit found that all three conditions of this Court's formulation of the Government contractor defense in *Boyle* were satisfied as a matter of law. *Harduvel*, 878 F.2d at 1320-22.

The Eleventh Circuit's entry of judgment *n.o.v.* in favor of General Dynamics was a routine exercise of the appellate court's authority under Rule 50(d) of the Federal Rules of Civil Procedure. *See Davison v. Pacific Island Navigation Co.*, 569 F.2d 507, 509 (9th Cir. 1978); *Prudential Insurance Co. v. Schreffler*, 376 F.2d 397, 402 (5th Cir.), *cert. denied*, 389 U.S. 1005 (1967); *see also Marino v. Ballestas*, 749 F.2d 162 (3d Cir. 1984) (when presented with an appeal from the denial of motions for judgment *n.o.v.* or, in the alternative, a new trial pursuant to Fed. R. Civ. P. 50(d), the appellate court has discretion to order the district court to enter judgment for the appellant, to order a new trial, or to refer the question of whether or not to order a new trial to the district court).

As this Court has noted:

> Rule 50(d) is applicable to cases such as this one where the trial court has denied a motion for judgment *n.o.v.* . . . . Rule 50(d) also emphasizes that "nothing in this rule precludes" the court of appeals "from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted." Quite properly, this Rule recognizes that the appellate court may prefer that the trial judge pass first upon the appellee's new trial suggestion. Nevertheless, consideration of the new trial question "in the first instance" is lodged with the court of appeals. And Rule 50(d) is permissive in the nature of its direction to the court of appeals: as in Rule 50(c)(1), *there is nothing in Rule 50(d) indicating that the*

> *court of appeals may not direct entry of judgment n.o.v. in appropriate cases.*

Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 323-24 (1967) (emphasis added). Given that there is no greater restriction on the province of the jury when a Court of Appeals enters judgment *n.o.v.* than when a trial court does so, the Seventh Amendment's right to jury trial does not bar an appellate court from granting judgment *n.o.v. Id.* at 322.[7] *Cf. Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989) (upholding grant of summary judgment under military contractor defense); *Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. 1019 (S.D. Ill. 1989) (granting summary judgment under government contractor defense); *Zinck v. ITT Corp.*, 690 F. Supp. 1331 (S.D.N.Y. 1988) (granting summary judgment under government contractor defense).

Petitioner contends that remand is required because a Court of Appeals cannot order judgment *n.o.v.* where the record reveals a new trial issue which has not been resolved. In making this argument, Petitioner seeks to stretch a very narrow exception to the appellate court's authority under Rule 50(d) of the Federal Rules of Civil Procedure to fit the facts of this case. Examination of the decision on which Petitioner relies to expand this exception reveals that the unresolved trial issue that precluded the appellate court from entering judgment *n.o.v.* was the suggestion in the complaint and evidence of an alternative theory of liability upon which the jury had not acted. *See Neely v. Martin K. Eby Construction Co.*, 386 U.S. 325 (1967) (citing *Weade v. Dichman, Wright & Pugh, Inc.*, 337 U.S. 801, 808-09 (1949)

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[7] It is unnecessary to address Petitioner's reliance on Fed. R. Civ. P. 38(a) separately, as this Rule merely states that the right to a jury guaranteed by the Seventh Amendment or a federal statute is preserved to the parties. Petitioner does not assert any federal statute as the basis for her right to a jury decision in the instant case.

(although the jury had addressed defendant's alleged liability as a common carrier, it had not treated the issue of defendant's own negligence while acting as a general agent)).

Neither of the two "new trial issues" proposed by Petitioner herein qualify as alternative theories of liability left unresolved at trial. The Government contractor defense is not a theory of liability, but a carefully crafted defense intended to shield military contractors from tort liability for design defects under specified circumstances. The trial court had recognized the applicability of the defense, but had employed an incorrect formulation of it in light of this Court's subsequent decision in *Boyle*. As noted in the argument above, this is not an instance where the trial court had failed to allow the contractor to present the defense.

Moreover, the "newly-discovered evidence" cited by Petitioner is in no way different from the evidence presented at trial regarding her allegations of a defect in the aircraft.[8] The Eleventh Circuit specifically deter-

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[8] Petitioner's suggestion that her "newly-discovered evidence" was withheld by General Dynamics in discovery is totally baseless and is merely a shabby attempt to prejudice this Court. In both her petition for rehearing before the Eleventh Circuit and the petition before this Court, Petitioner coyly declines to reveal either the source of this information or exactly when she obtained it.

In her petition for rehearing before the Eleventh Circuit, Petitioner indicated that the so-called documents were in her possession prior to the appeal before the Eleventh Circuit was heard. Moreover, Petitioner disingenuously claimed that she did not advise the Eleventh Circuit of her charges against General Dynamics because there was no compelling need to do so until she had lost the appeal.

Indeed, it is clear that most, if not all, of the documents appended to Petitioner's request for a rehearing to the Eleventh Circuit were in her possession before she filed her notice of appeal on October 6, 1987. This fact is conclusively demonstrated by a letter dated September 23, 1987, to counsel for General Dynamics from an attorney in the firm of Petitioner's counsel of record. Appended to this letter

mined that such evidence constituted no evidence of a manufacturing defect. *Harduvel*, 878 F.2d at 1318-20. If these documents are relevant to an issue at trial, they are relevant solely to the issue of design defect. Given the Eleventh Circuit's exhaustive review of the record on appeal,[9] the court's rejection of Petitioner's request for a rehearing on the basis of this evidence is entitled to a high degree of authority. These documents add nothing new to the record and are certainly neither an alternative theory of liability nor evidence of such.

As the Petitioner admits, consideration of this contention will involve a review of the record by this Court. Petitioner's request that this Court expend a significant amount of its limited time on a virtual rehearing of her contentions of manufacturing defect after the Eleventh Circuit has already thoroughly examined this issue is, at the very least, importunate. More importantly, however, this request does not provide a basis for issuance of a writ of certiorari under the rule cited by Petitioner.

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were a number of documents which Petitioner's counsel alleged at that time to have been withheld by General Dynamics.

A comparison of those documents and the twenty documents appended to the petition for rehearing before the Eleventh Circuit reveals that all but three of the documents on which Petitioner bases her claim of "newly-discovered evidence" were appended to this September 23, 1987 letter. At the time of the letter, the case was still within the jurisdiction of the trial court; the trial judge did not issue his memorandum decision denying General Dynamics' motion for judgment *n.o.v.* until September 30, 1987.

Instead of notifying either the trial court or the Eleventh Circuit, as would have been the proper course if Petitioner had believed this evidence to be probative, Petitioner has now filed an action in fraud and intentional tort against General Dynamics in a Texas state court. General Dynamics believes this action to be Petitioner's desperate attempt to manufacture credibility for her spurious claim.

[9] The comprehensiveness of the Eleventh Circuit's review of the record on appeal is illustrated by the fact that the court cites in support of its findings exhibits from the record not specifically named by either of the parties in their briefs on appeal.

CONCLUSION

The Eleventh Circuit properly interpreted and applied the government contractor defense in this case. Moreover, the court's entry of judgment *n.o.v.* was a routine exercise of its appellate authority. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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